89-396

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

JOHN W. WIGGINS and GARY R. ADAMS,
Petitioners,

vs.

FIRESTONE TIRE & RUBBER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether, in an action for wrongful discharge under the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"), 29 U.S.C. §§621-634 (1982), in which the former employee Petitioners invoked the indirect proof formulation of disparate treatment enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in a situation of a corporate reorganization and personnel cutback or reduction in force ("RIF") by the Respondent employer, the Sixth Circuit Court of Appeals, in conflict with all ten other Circuits which have squarely addressed the issue, illogically and impermissibly required that each Petitioner, in order to establish a *prima facie* case, show that a younger person directly replaced him in his "eliminated" job?

2. Whether proof of the Respondent employer's *non*-neutral policies, patterns and practices of rampant routine usage of personnel transaction forms, rosters and profiles, all flagrantly facially discriminatory, in *per se* violation of Section 4(a)(2) of the ADEA, 29 U.S.C. §623(a)(2), in displaying the employees' birthdates and service or graduation dates (as proxies for age) (the "Age Data Forms"), in conjunction with percentage of payroll and/or "headcount" reduction quotas, established a *prima facie* case of disparate impact or effect upon the former employee Petitioners, the oldest and third oldest in an 11 person department and the only ones discharged in the RIF; and Petitioners were not required to adduce proof of intentional age discrimination, while the Respondent employer, which did not even make proffer, bore the burden of proof of the affirmative defenses under Section 4(f) of the ADEA, 29 U.S.C. §623(f), of economic justification or other legitimate business reasons for the use of the insidious and invidious Age Data Forms?

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The petitioners, John W. Wiggins and Gary R. Adams, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix. It is not reported, and that fact is reflected at 876 F.2d 105(T). The opinion of the District Court for the Northern District of Ohio is unreported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 7, 1989, and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §623 (1982) Prohibition of age discrimination

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) . . . .

It shall not be unlawful for an employer . . .

(1) to take any action otherwise prohibited under subsections (a) . . . of this section . . . where the differentiation is based on reasonable factors other than age . . . .

STATEMENT OF THE CASE

This case arises under the Age Discrimination in Employment Act of 1967 (the "ADEA" or "Act"), 29 U.S.C. §§621-634 (1982). Petitioners John W. Wiggins and Gary R. Adams ("Wiggins" and "Adams" or the "former employees"), both residents of the Northern District of Ohio, Eastern Division, petition this Court from affirmance by the Sixth Circuit Court of Appeals of an adverse and final summary judgment of dismissal of their claims under the ADEA for wrongful discharge from long-time salaried employment at Akron, Ohio by the Retread Division of Respondent, The Firestone Tire & Rubber Company ("Firestone" or "the employer"), an Ohio corporation having its principal place of business at Akron.

On August 21, 1987, the former employees Wiggins and Adams commenced suit against Firestone in the Court of Common Pleas of Summit County, Ohio. The complaint in the former employees' state court suit for damages was for three claims for relief or causes of action: wrongful discharge from employment because of age in violation of the ADEA; correlative violation of a state statute, Ohio Rev. Code Ann. §4101.17 (1980), by such discharge; and breach of employment promises and assurances published by Firestone in various salaried personnel handbooks and manuals ("Firestone Handbooks") based upon Ohio common law principles of implied contract and promissory estoppel.

On September 14, 1987, Firestone timely removed the case to the United States District Court, Northern District of Ohio, Eastern Division at Akron by reason of the federal ADEA allegation.

On January 29, 1988, by sworn affidavit filed in the District Court, the former employees Wiggins and Adams consented in writing to suit under the ADEA

and verified the factual allegations of their complaint, including detrimental reliance upon the promises and assurances in the Firestone Handbooks. Subsequently, Firestone, in response to requests for admissions, admitted that it was an employer within the meaning of the ADEA and that all conditions precedent to the District Court's exercise of jurisdiction in the case had been met or complied with.

On February 16, 1988, Firestone filed answers to interrogatories asking the "reasons, in detail, for plaintiffs' discharges from and termination of employment with defendant Firestone" and requiring the "stating, with particularity, the facts and surrounding circumstances" for such reasons. Firestone's sole sworn response and defense was, "The retread department was in the process of being reorganized [sic] and the Plaintiffs' positions were eliminated."

On February 22, 1988, the employer Firestone filed a motion to strike certain allegations of the state statutory claim and a motion for summary judgment of dismissal of all claims of the complaint.

On March 7, 1988, the former employees Wiggins and Adams filed a cross-motion for partial nonsuit and voluntary dismissal of the state statutory claim and allegations.

On March 14, 1988, the former employees filed an opposition to Firestone's motion for summary judgment, including a four-page listing of 28 record items comprising approximately 450 pages of deposition transcript, exhibits, affidavits, pleadings and admissions and answers to interrogatories, not counting about 100 pages of the parties' memoranda of law on the pending motions.

Just over a week later on March 22, 1988, the District Court, having "carefully reviewed the entire record," granted the employer Firestone's motion for summary judgment on the federal ADEA claim of the complaint.

The District Court found, in pertinent part, that, "Viewing the evidence in the light most favorable to the plaintiffs [former employees Wiggins and Adams], in light of binding Sixth Circuit precedent the Court concludes that the plaintiffs have failed to establish a *prima facie* case of age discrimination .... The plaintiffs have not come forward with any direct evidence, such as discriminatory comments or statements by management personnel, to support their claims of discrimination. Further, in the Court's view the primary problem which the plaintiffs face in prosecuting their claim is that neither plaintiff was replaced. The duties of both plaintiffs were instead parcelled out to other people already in the department."

Having thus granted summary judgment of dismissal on the federal ADEA claim, the District Court, in the exercise of discretion on authority of *Carnegie-Mellon University v. Cohill*, 485 U.S. _____, _____, 108 S. Ct. 614, 619 (1988), ordered remand of the remaining two pendent state law claims of the complaint to the Court of Common Pleas of Summit County, Ohio.

On April 21, 1988, Petitioners, the former employees Wiggins and Adams, duly filed a notice of appeal to the Sixth Circuit Court of Appeals from the District Court's final Order and summary judgment of March 22, 1988.

On June 7, 1989, the Court of Appeals affirmed the District Court; and, on July 26, 1989, denied Petitioners' petition for rehearing and rehearing *en banc*.

STATEMENT OF FACTS

Undisputed and Indisputable Facts

The former employee Petitioners were long-service salaried members of middle management of the employer Firestone's Retread Division headquarters department 7301 in Akron, Ohio. They were each fired within four days in August 1985, when their jobs were supposedly "eliminated" in a purported "reorganization" or reduction in force ("RIF") in Retread. The job performance of each of these former employees had been satisfactory; and their computerized employment records at their dates of termination each displayed under the category "Last Employee Assessment-Performance," that "Met Require."

Wiggins had been employed in Firestone Retread plant, production, sales and staff planning positions for 33 years after his graduation from Otterbein College, attaining a headquarters position and a monthly salary of $3,600, before his demotion in October 1984 and "RIF" discharge in August 1985 at age 57.

Adams, upon graduation from Baldwin-Wallace College, joined Firestone's Retread plant management, involving production and sales, achieving a headquarters position and monthly salary of $3,210 (with his last raise in May 1985) before he was likewise discharged or "RIF'ed" in August 1985, at age 49 and after 24 years of service.

Firestone accorded neither any option of job transfer, downgrading or replacement or "bumping" of less senior employees.

Each was fired at the direction of a Firestone Group Vice President, then age 46. The actual firings were done by the Retread Headquarters department manager Joseph R. Little.

The department manager Little was then age 39; and after the firing of Wiggins and Adams (respectively, the oldest and third oldest), the department consisted of eight persons, namely (with ages and years of service): Little (39, 20); Richard L. Swenson (46, 17); John J. Inama (41, 16); William T. Leonard (48, 29); W. Patrick McKelvey (34, 16); Clyde J. Bowman, Jr. (52, 28); Anne A. Hudack (55, 4); and Linda A. Lingelbach (31, 14).

The average age in the department thereby decreased from 45.3 to 43.9 years and had decreased from 50 years in 1981.

At least as early as 1975, the employer Firestone had published a "Firestone Handbook" containing the promises and assurances that, "Credited Service is an important factor in providing opportunities for promotion or transfer and job security for you. Due consideration is given to credited service in selection of persons for promotion or for additional training, or in making personnel reductions or transfers where necessary because of a decline in work requirements."*

In 1980-82, Firestone adopted policies and procedures of "downgrades," "lateral transfers" and "bumps" in "RIF" situations.

From at least as early as 1982 and even up to the end of 1987, the employer Respondent Firestone maintained, generated and disseminated in Akron a plethora of facially discriminatory computerized personnel forms and reports, rife with birthdates, service

* This very Firestone Handbook has been held to have created a unilateral contract and part of its salaried employees' compensation package. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 146-48 (3d Cir. 1987) (RIF termination pay), *aff'd. in relevant part*, _____ U.S. _____, 109 S. Ct. 948 (1989); *Downey v. Firestone Tire & Rubber Co.*, 630 F. Supp. 676 (D.D.C. 1986) (due consideration for transfer in a RIF).

dates and ages. Such computer forms and reports (collectively, the "Firestone Age Data Forms") even limited, segregated and classified employees by sex, ethnic origin and education and were regularly used or were readily accessible to Firestone management for budget and personnel planning and employee salary and title adjustments.

Then, in 1985 the employer Firestone gave its Retread Division "marching orders" to make a "head count reduction" of 10% of its payroll. This "head count reduction" was achieved by the "RIF" of the former employees Wiggins and Adams, and the axes were the infamous Age Data Forms.

Ironically and tragically, after 24 years of service, it was only in the course of this lawsuit that the former employee Adams, a graduate of Baldwin-Wallace College, learned that his Age Data Forms erroneously listed his "Education" as "High School Graduate." Firestone's records did not show how long its computers and managers had this wrong.

In any event, as established above, the only "choice" given these older former employees Wiggins and Adams by Firestone was discharge in a purported "RIF" with "early retirement" with whatever vested pension benefits they had. Contrary to the Firestone Handbook promises and assurances and Firestone's long-standing policies, practices and procedures for transfers or downgrades, the decades of "credited service" of Wiggins and Adams were not given "due consideration" or any at all; and they were denied any such options.

Upon the firing of Wiggins (age 57) and Adams (49), their duties and work in progress were assumed, respectively, by Swenson (46), Leonard (48) and

McKelvey (34), on the one hand, and Bowman (52), but principally Lingelbach (31), on the other. Lingelbach shortly got a promotion.

There is yet a further ironic irreconcilable inconsistency in Firestone's contention of "elimination" of the former employees' jobs in a purported "reorganization" or "RIF." Adams was hired back briefly on an hourly basis at Firestone's Brookpark, Ohio Retread facility to do the same job. Adams was discharged from Brookpark shortly after the administrative filing of his age discrimination charge.

Genuine Issues of Material Fact

The record on appeal was replete with conflicts of evidence and credibility questions impinging upon the gravamen of this ADEA wrongful discharge case.

The former employees Wiggins and Adams, corroborated by Wiggins' former boss Swenson, contended that their duties and work were assumed by younger employees. On the other hand, Firestone's affiants claimed the jobs were "eliminated" with "remaining job duties parceled out."

The pretextual nature of Firestone's sole defense and allegedly articulated legitimate nondiscriminatory reason for the firings was also gainsaid by a clashing conflict of evidence. Firestone baldly asserted, without corroboration or substantiating documentation, that the Retread Division was unprofitable, rendering the "reorganization" and "RIF" an economic necessity. In stark contrast, Bowman, the accounting manager swore to and supported a substantial eight month profit for the Division of $1,299,000 at June 1986.

Respondent Firestone did not prove, or even proffer, an economic or business justification for personnel decision-maker use of the facially discriminatory Age Data Forms.

REASON FOR GRANTING THE WRIT

IMPORTANT QUESTIONS OF FEDERAL LAW, WHICH SHOULD BE SETTLED BY THIS COURT, HAVE BEEN DECIDED BY THE SIXTH CIRCUIT COURT OF APPEALS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF TEN OTHER CIRCUITS AND OF THIS COURT.

I. Assuming, without conceding, that there was no direct and immediate replacement of the former employee Petitioners in the RIF and that there was no direct evidence of discriminatory intent, this element of proof is illogical and unnecessary under the ADEA where the purported job elimination permits retention of younger persons or according them more favorable treatment, particularly where (as here) the employer has a self-imposed contractual duty to allow transfers, bumping, downgrades, layoffs with recall or other less-detrimental alternatives.

All Circuits which have thus far directly confronted this issue have so held due to the logical impossibility of proving a RIF replacement in an "eliminated" job and the consequent merging and fusing of the three stages of the *McDonnell Douglas* model of indirect proof, thereby relegating victims of age discrimination in a RIF to the onerous burden of direct proof of rare "smoking gun" intent and issuing an open invitation to employer subterfuge. *See, Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 n. 2 (1st Cir. 1988) ("we expressly disclaim ... dictum and hold that replacement by a younger person (or one outside the 'protected' age group) is not an element of the plaintiff's prima facie case in an ADEA suit"); *Montana v. First Federal S. & L. of Rochester*, 869 F.2d 100, 103-05 (2d Cir. 1989) (citing cases from three other circuits); *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 60 (3d Cir. 1988) ("In a reduction

in force when a complaining employee is not replaced, he, as a plaintiff alleging a discriminatory layoff need show only that . . . he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably"); *Herold v. Hajoca Corp.*, 864 F.2d 317, 319-21 (4th Cir. 1988) (RIF, position eliminated, same elements as *White* or "some other evidence that the employer did not treat age neutrally" and "long-standing policy of laying off the workers with least seniority first . . . if followed, would have allowed him to 'bump' . . . even if . . . in other job classifications . . . that he could perform [or] . . . could have . . . if he had received nominal training" *cert. denied*, _____ U.S. _____, 109 S. Ct. 3159 (1989); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 407-08 (5th Cir. 1989) (RIF, job eliminated, "younger employees, or those outside the protected group, were more favorably treated" and "jury was entitled to infer . . . that, by retaining younger, lesser paid employees who were not nearly so close to retirement, Lone Star was attempting to further a plan to reduce the average age and pay") *cert. denied*, _____ U.S. _____, 109 S. Ct. 2448 (1989); *Oxman v. WLS-TV*, 846 F.2d 448, 454-55 (7th Cir. 1988) (no replacement or direct proof of discriminatory intent required in a RIF, otherwise "seems to stand the *McDonnell Douglas* approach on its head . . . at the very least fuses the 'prima facie' and 'pretext' steps . . . . At worst . . . a victim . . . no longer can prevail without producing *any* evidence that age was a determining factor . . . . The modification thus obviates the central purpose behind the *McDonnell Douglas* method, which is to relieve the plaintiff of the burden of having to uncover what is very difficult to uncover—evidence of discriminatory intent"); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1056-59 (8th Cir. 1988) (two oldest in nine person department laid off, computerized system made job obsolete, "statistics are used only as circumstantial evidence which tends to support a specific claim of disparate treatment" and "job out of existence" was a

"discredited explanation for firing" and "itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred"); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) (in RIF "plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee . . . element may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the [RIF]" and "that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent"); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 862 (11th Cir. 1988) ("The effect of Bell's restructuring violates a central teaching of this Court's decisions in ADEA cases. An employer may not organize its workforce to expose older workers to reductions while insulating younger employees . . . plan that effectively shifted 'protected' workers into jobs likely to bear the brunt of a [RIF] would signal age discrimination"); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342-43 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

This Court has also recently let stand the Third Circuit's elimination of a disparate treatment RIF replacement requirement. *Brieck v. Harbison-Walker Refractories*, 624 F. Supp. 361 (W.D. Pa. 1985), *reversed*, 822 F.2d 52(T), 47 FEP Cases 1527 (3rd Cir. 1987) (no replacement in layoff, jury question on later recall of younger person), *cert. dismissed*, _____ U.S. _____, 109 S. Ct. 546 (1988).

In sum, even without a direct RIF replacement or direct evidence of discriminatory intent, the former employees' disparate treatment case based upon retention of younger persons and/or more favorable treatment of them should go to a jury; and this Court should grant review and reverse and remand.

II. The former employee Petitioners' statistical evidence comports with the disparate impact formulations of this Court, "which have never been framed in terms of any rigid mathematical formula." *Watson v. Forth Worth Bank and Trust*, 487 U.S. _____, 108 S. Ct. 2777, 2789, 101 L.Ed.2d 827 (1988) (O'Connor, *J.* for the Court and for plurality on this section).

"If the employer discerns fallacies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own .... [Defendants] may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded."

"Without attempting to catalogue all of the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques ...." *Id.*, at 108 S. Ct. 2790 (citations and internal quotation marks omitted).

The clear import of these guidelines enunciated by this Court is that such issues and competing claims of significance and inferences of causation should be resolved by the trier of facts.

In the instant case, Firestone's unfettered usage from 1982 to 1985 of the flagrantly facially discrimination Age Data Forms in personnel decisions, including termination of the former employees Wiggins and Adams, respectively the oldest and third oldest in their department, has been shown to have had a significant disparate impact or effect on older employees in the department in terms of a dramatic decline of 6.1 years in the average ages.

The District Court and Court of Appeals ignored the "existence" of the Age Data Forms, apparently *sub silentio* finding them permissible under Equal Employment Opportunity Commission record-keeping regulations adopted long after the enactment of the ADEA. Such non-contemporaneous regulations, especially where (as here) their application is utterly inconsistent with the plain language of Section 4(a)(2) of the ADEA, are not entitled to deference. *Public Employees Ret. Sys. of Ohio v. Betts*, 491 U.S. _____, 109 S. Ct. 2854, 2862-64, 105 L.Ed.2d _____ (1989).

Reasonable minds could infer that the Respondent employer's patterns and practices of rampant and reckless reliance upon such insidious and invidious innundation of the Age Data Forms caused the substantial statistical disparities. Thus, this Court should grant review and reverse and remand for jury trial of the disparate impact case.

CONCLUSION

This is an appropriate case for the Court to resolve two areas of longstanding conflict among the Circuits in the application of standards of proof and the presumptions which apply in ADEA cases. The fact pattern in this case is typical. In fact, in almost every case, the employer files a motion for summary judgment. Yet, the applications of the burden-shifting analysis set forth in *McDonnell Douglas* and *Watson* are in need of clarification and reconciliation among the Circuits in the context of an employer's motion for summary judgment. The conflict precludes uniform application of the ADEA and illogically and unfairly ensures employer victory in the vast majority of cases in the Sixth Circuit. Therefore, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 7, 1989)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-3358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. WIGGINS and GARY R. ADAMS,
Plaintiffs-Appellants,

v.

FIRESTONE TIRE & RUBBER COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: JONES and RYAN, *Circuit Judges*; and HORTON, *District Judge.**

PER CURIAM. Plaintiffs appeal the district court's order granting summary judgment for the defendant in this age discrimination action. For the following reasons, we affirm the district court's decision.

* Honorable Odell Horton, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

I.

Beginning in April 1980, defendant-appellee Firestone Tire & Rubber Co., (Firestone) imposed significant personnel cutbacks throughout the company. In August 1985, plaintiffs-appellants, John W. Wiggins and Gary R. Adams, were informed by Firestone that their jobs at Firestone's Retread Division (Retread) would be terminated pursuant to this reduction in forces (RIF). At this time, Wiggins, who was 57 years old, had been employed at the Retread Division for 33 years and Adams, who was 49, had been employed for 24 years.

Wiggins and Adams stated that they knew Firestone had been experiencing economic problems. However, because they had received positive performance reviews in the past, they claim that they never suspected that their jobs would be terminated in a RIF. Although Firestone contends that Wiggins and Adams were eliminated because their positions were the most expendable in the total operation of Retread, Wiggins and Adams maintain that they were fired because they were two of the oldest employees in the division. As a result of Firestone's decision, Wiggins and Adams elected early retirement and received termination pay. Both parties agree that the plaintiffs' positions were never filled and that their duties were distributed to other members of Retread. Wiggins and Adams maintain, however, that their duties were distributed to younger members of Retread and that, from 1981 to 1985, the average age in the division decreased by slightly over six years.

Wiggins and Adams contend that they should have been given the option of replacing or "bumping" employees with less seniority who worked in Retread. Although Firestone acknowledges that it has a policy

which allows employees who are terminated as a result of a RIF to transfer to other positions in the company, Firestone maintains that neither Wiggins nor Adams were [*sic*] eligible to bump any other Retread employee because they did not supervise anyone in their department and because they had never held a lower position within that department. Thus, Firestone maintains that it was under no obligation, pursuant to the written RIF policy, to give Wiggins and Adams the option of transferring to another position.

The district court determined that Wiggins and Adams failed to prove that Firestone used the RIF as a pretext to discriminate against them on the basis of their age. Thus, the court held that Firestone was entitled to judgment as a matter of law on the age discrimination claim. The court ordered a remand of the state law breach of employment contract claim to the Court of Common Pleas for Summit County, Ohio. On appeal, Wiggins and Adams have not challenged the district court's remand of the state law claim.

II.

We must affirm a district court's decision to grant summary judgment if the evidence shows that there are no genuine issues as to any material facts and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). Wiggins and Adams maintain that the district court erred in granting summary judgment for Firestone because Firestone's written policies, statements made by Firestone managers and the statistical evidence concerning the decline in the average age in the division proves that Firestone terminated them because of their age.

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §629(a)(1)(1982), provides that it is unlawful for an employer to discharge employees because of their age. Although this court has relied on the criteria established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether plaintiffs have shown a prima facie case of discrimination, this court has "refused to follow blindly the four-part *McDonnell Douglas* formula in ADEA cases" and has instead "adopted a case-by-case approach, one that would allow us to remain attentive to the realities of the business world." *Simpson v. Midland Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987). Thus, this court has stated that to establish a prima facie case of discrimination in non-RIF situations, plaintiffs must show that they were members of a protected class, that they were subject to an adverse employment action, that they were qualified for their positions, and that they were replaced by younger persons. In reorganization cases, this court has required plaintiffs to "come forward with additional direct, circumstantial, or statistical evidence that age was a factor in [their] termination." *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984).

Turning to the instant action, although Wiggins and Adams have satisfied the first three parts of the *McDonnell Douglas* test, the record does not indicate that they were not [*sic*] replaced by younger workers but, rather, their work was merely distributed to existing workers. Assuming, arguendo, that they satisfied the *McDonnell Douglas* test for a non-RIF setting, the additional evidence which they presented fails to prove that age was a factor in their termination.

A.

Wiggins and Adams maintain that Firestone's written policies are facially discriminatory. Firestone's RIF policy, however, specifically provides that in determining which positions should be terminated, the manager should select employees in order of the *least* senior first. Thus, the written RIF policy is not facially discriminatory.

Wiggins and Adams also contend that Firestone relied on age information contained in "age charts" to determine which employees should be fired. Wiggins and Adams concede that Firestone did not violate the ADEA by maintaining information concerning the ages of its' [*sic*] employees. Rather, they maintain that Firestone was prohibited from using these charts when determining who should be terminated. While we agree that Firestone should not use "age charts" to determine which employees should be terminated, the Firestone personnel who made the decision to terminate Wiggins and Adams denied that they used the age charts in making their decision. Since Wiggins and Adams have not presented any evidence which refutes this denial, we agree with the district court that the mere existence of these charts does not establish that Firestone fired Wiggins and Adams on the basis of age.

B.

Wiggins and Adams maintain that various oral statements made by Firestone executives evidence Firestone's discriminatory motive in firing them. Because Wiggins and Adams were unable to attribute any age-related comments to the Firestone personnel who made the decision to terminate their positions, we agree with the district court that these alleged oral statements do not establish that they were terminated on the basis of age.

C.

Finally, Wiggins and Adams contend that because the average age of Retread employees declined by 6.1 years between 1981 and 1985, this evidences Firestone's intent to fire them because of their age. We note initially that, although the statistical evidence indicates the ages of the employees who left Retread between 1981 and 1985, the evidence does not indicate if the employees left voluntarily or whether they were involuntarily terminated by Firestone. Moreover, this court has found that a decreasing average employee age standing alone does not prove the existence of age discrimination. *Simpson v. Midland Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987). Because the statistical evidence in this case is not as comprehensive as the evidence which this court found to be insufficient in *Simpson*, this evidence does not establish the plaintiffs' claim that they were terminated because of their age.

III.

Because the district court remanded the state law contract claims, we need not discuss whether Firestone breached its' [*sic*] RIF policy by not allowing Wiggins and Adams to "bump" employees with less seniority. Since this court has held that "[w]here an employer reduces his workforce for economic reasons, it incurs no duty to transfer an employee to another position within the company." Firestone was under no duty under the ADEA to offer Wiggins and Adams alternate employment. *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986).

IV.

Because we find that there is no genuine dispute as to any material fact, the judgment of the district court is hereby AFFIRMED.

A TRUE COPY

Attest:

LEONARD GREEN, *Clerk*
By: GARY MCCARTHY, *Deputy Clerk*

ISSUED AS MANDATE: August 4, 1989
COSTS: None

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed March 22, 1988)

CASE NO. C87-2399A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. WIGGINS, *et al.*,
Plaintiffs,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

MEMORANDUM OPINION

DOWD, *J.*

On August 21, 1987, plaintiffs John W. Wiggins and Gary R. Adams filed suit against the defendant, The Firestone Tire & Rubber Company, in the Court of Common Pleas of Summit County, Ohio. The plaintiffs alleged they were wrongfully discharged from their employment at Firestone. Specifically, the plaintiffs alleged that their employment was terminated in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (count I); in violation of Ohio's Age Discrimination Act, Ohio Rev. Code §4101.17 (count II); and in breach of an implied contract created by promises and assurances contained in Firestone employee handbooks (count III).

On September 14, 1987, pursuant to 28 U.S.C. §1441, the defendant timely removed the case to federal court on the basis of federal question jurisdiction by reason of the federal ADEA allegation. There is no diversity of citizenship between the parties.

Before the Court is the motion of the defendant for summary judgment and the plaintiffs' opposition to the motion. For the reasons that follow, the defendant's motion is granted as to count I (the federal ADEA claim) and the remaining pendent state claims contained in counts II and III are remanded to the Court of Common Pleas of Summit County, Ohio.

FACTUAL BACKGROUND

The plaintiffs are former salaried employees of Firestone. Both plaintiffs held middle management positions in Department No. 7301 of Firestone's Retread Division. In late August, 1985, both plaintiffs were terminated from employment pursuant to a reduction in force (RIF) program. The plaintiffs were informed that their respective positions had been eliminated. Neither plaintiff was offered the opportunity to transfer to a different position with Firestone. At the time of the plaintiffs' termination from employment, Mr. Wiggins was 57 years old and had thirty three years of service with Firestone. Mr. Adams was 49 years old and had twenty four years of service with Firestone.

In July of 1986, Firestone sold its Retread Division to Pro-Tread Corporation. From the time that the plaintiffs were terminated from their employment until the time of the sale to Pro-Tread, the plaintiffs concede that no one was hired or transferred to replace the plaintiffs. Rather, the plaintiffs' duties were parcelled out to other employees in Department No. 7301.

THE FEDERAL CLAIMS

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e). The "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise . . ., must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, _____, 106 S. Ct. 2505, 2511 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 258 (1968)).

Therefore, "[i]f the evidence is merely colorable, . . ., or not significantly probative, summary judgment may be granted." *Id.* (citing, *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Cities Service*). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, _____ U.S. _____, _____, 106 S. Ct. 2548, 2553 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, _____ U.S. at _____, 106 S. Ct. at 2511.

The plaintiffs claim that age discrimination was the motivating factor behind Firestone's termination of the plaintiffs' employment. The sole defense is that the employment decisions in question were made pursuant to a legitimate RIF program necessitated by economic conditions.

In support of their claim, the plaintiffs point to the fact that Firestone maintained employee lists, such as age data forms, which categorized employees according to age and years of service. Plaintiffs' theory essentially is that Firestone had decided that a certain dollar amount must be cut from the budget, and that ready access to information regarding employees' ages and years of service encouraged management to make the necessary cuts by eliminating the older employees who were more costly to the company than the younger employees. The plaintiffs argue that this ready availability of age information, coupled with the failure

of Firestone to allow the plaintiffs either to transfer or to "bump" younger employees, creates a genuine issue of material fact whether Firestone terminated the plaintiffs' employment because of their age.

The Court has carefully reviewed the entire record. Viewing the evidence in the light most favorable to the plaintiffs, in light of binding Sixth Circuit precedent the Court concludes that the plaintiffs have failed to establish a *prima facie* case of age discrimination.

The standard of analysis and proof in age discrimination actions has been clearly established. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986); *Blackwell v. Sun Electric Co.*, 696 F.2d 1176 (6th Cir. 1983). Initially, the plaintiff bears the burden of coming forth with evidence that establishes a *prima facie* showing of discrimination. The Sixth Circuit has defined the plaintiff's initial burden as producing enough evidence to shift the burden of production, as compared to the burden of persuasion, to the defendant. *Ridenour*, 791 F.2d at 55 (citing *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)). Once that *prima facie* showing is made, the defendant has the obligation of coming forward and articulating some legitimate nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 254. If the defendant meets this obligation, the plaintiff then must persuade the trier of fact that the articulated reason was a mere pretext for discriminatorily motivated action. *Burdine*, 450 U.S. at 255-56; *Ridenour*, 791 F.2d at 56. Despite the shifting burdens of production, the "burden of persuasion rests upon the plaintiff throughout the proceedings . . . ." *Ridenour*, 791 F.2d at 56 (citing *Burdine*, 450 U.S. at 256).

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff establishes a *prima facie* case when he or she establishes that: (1) he or she was a member of the protected class; (2) he or she was discharged; (3) he or she was qualified for the position; and (4) he or she was replaced by a younger person. *McDonnell Douglas Corp.*, 411 U.S. at 802.

The plaintiffs have not come forward with any direct evidence, such as age discriminatory comments or statements by management personnel, to support their claims of age discrimination. Further, in the Court's view the primary problem which the plaintiffs face in prosecuting their claim is that neither plaintiff was replaced. The duties of both plaintiffs were instead parcelled out to other people already in the department.

The Sixth Circuit Court of Appeals has held that a plaintiff who is terminated within the context of an economic reorganization or a reduction in force program bears a greater burden of proof than a plaintiff who is terminated in a situation not involving economic cutbacks. *See Ridenour v. The Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986), in which the Court explained this heavier burden as follows:

> To meet his ultimate burden of demonstrating that he was a victim of age discrimination, the plaintiff, in addition to proving that he fell within the protected class, that he was terminated and that he was replaced by a younger individual, must come forward with additional direct, circumstantial, or statistical evidence that age was a determining factor in his termination.

See also Simpson v. Midland Ross Corp., 823 F.2d 937 (6th Cir. 1987); *LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087 (6th Cir. 1984); *Sahadi*

v. Reynolds Chemical, 636 F.2d 1116 (6th Cir. 1980) (*per curiam*). In summary, under controlling Sixth Circuit precedent, the Court concludes that the plaintiffs in the present case have failed to establish a *prima facie* case of age discrimination, and that summary judgment on the federal age discrimination claim must therefore be entered in favor of the defendant.

PENDING STATE CLAIMS

As the Court has granted summary judgment to the defendant on the sole federal claim, and since only pendent state law claims remain following the Court's decision on the federal claim, the Court in its discretion has determined that the values of economy, convenience, fairness, and comity dictate that the remainder of the case, including the pending motion of defendant to dismiss and strike (docket #33) and cross-motion of the plaintiffs for partial nonsuit (docket #48), should be remanded to the Court of Common Pleas for Summit County, Ohio. *See Carnegie-Mellon University v. Cohill*, 108 S. Ct. 614, 619 (1988).

CONCLUSION

For the foregoing reasons, the motion of the defendant for summary judgment is granted on count I of the plaintiffs' complaint, and the remainder of the case is remanded to the Court of Common Pleas for Summit County, Ohio.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
DAVID D. DOWD, JR.
U. S. District Judge

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed March 22, 1988)

CASE NO. C87-2399A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. WIGGINS, *et al.*,
Plaintiffs,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
Defendant.

JUDGMENT ENTRY

DOWD, *J.*

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of the defendant for summary judgment is granted on count I of the plaintiffs' complaint, and the remainder of the case is remanded to the Court of Common Pleas for Summit County, Ohio.

/s/ DAVID D. DOWD, JR.
DAVID D. DOWD, JR.
U. S. District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 26, 1989)

LEONARD GREEN, Clerk

No. 88-3358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. WIGGINS; GARY R. ADAMS,
Plaintiffs-Appellants,

v.

FIRESTONE TIRE & RUBBER COMPANY,
Defendant-Appellee.

ORDER

BEFORE: JONES and RYAN, *Circuit Judges*; and HORTON,* *Chief Judge,* United States District Court

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Odell Horton sitting by designation from the Western District of Tennessee.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
LEONARD GREEN, *Clerk*

No. 89-396

IN THE

Supreme Court of the United States

October Term, 1989

JOHN W. WIGGINS and GARY R. ADAMS,
Petitioners,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below erred by requiring Petitioners, whose positions of employment were eliminated amidst an economically-based departmental reorganization, to produce direct, circumstantial or statistical evidence in lieu of a direct or indirect replacement, in order to state a *prima facie* case of discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-34?

2. Whether the court below erred in holding that Petitioners failed to create a genuine issue of material fact that the non-discriminatory reasons articulated by Respondent for eliminating their positions of employment were but a pretext to discriminate in violation of the ADEA?

DISCLOSURE OF CORPORATE AFFILIATION

As of August 1, 1989, the Firestone Tire & Rubber Company, an Ohio corporation, has changed its name to Bridgestone/Firestone, Inc. Bridgestone/Firestone, Inc. is a wholly owned subsidiary of Bridgestone Corp., a publicly held corporation in Japan.

Bridgestone/Firestone Inc.'s non-wholly owned subsidiaries are: Firestone De la Argentina SAIC; NV Firestone Belgium SA; Harbell Fire & Casualty Co., Ltd; Xylos Assurance Limited; L&C Marine Transport Limited; L&C II Limited; L&C III Limited; Industria de Pneumaticos Firestone Ltda; Firestone France SA; France Pneu SA; Firestone Italia SpA; Firestone International Development SpA; Liberian Metal Processing Incorporated; Pista de Pruebas Amistad SA de CV; Firestone NZ Limited; Firestone Tire and Rubber Company of New Zealand Limited; Northern Tyre Company (1975) Limited; Firestone Hispania SA; Firestone (Ceylon) Limited; Firestone (Uganda) Limited.

Bridgestone/Firestone Inc.'s affiliates are: Hopewell International Insurance Ltd; United Insurance Company; Corporate Officers & Directors Assurance Holdings Ltd; Corporate Officers & Directors Assurance Ltd; Exel Limited; Firestone Products Industrias Ltda; Firestone Nordesta SA; Firestone Distribuidora e Commercial Ltda; Dayton Tire Canada Ltd; Firestone East Africa (1969) Limited; Liberian Bank for Development and Investment; Lone Star Transport Lines, Inc; Hulera El Centenario SA; Ultrallantas SA de CV; Philtread Tire & Rubber Corporation; Sumak Realty Corporation.

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No. 89-396

IN THE

Supreme Court of the United States

October Term, 1989

JOHN W. WIGGINS and GARY R. ADAMS,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam*, opinion of the United States Court of Appeals for the Sixth Circuit which is not recommended for full-text publication is reproduced in the Petition at App. A1. The unpublished opinion of the United States District Court for the Northern District of Ohio is reproduced at App. A8.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 7, 1989. Petitioners' request for rehearing and rehearing *en banc* was denied by the Court of Appeals by judgment entered July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §623(a)(1), (f)(3).

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(3) to discharge or otherwise discipline an individual for good cause.

29 C.F.R. §1627.3(a).

Records To Be Kept By Employers.

(a) Every employer shall make and keep for three years payroll and other records for each of his employees which contain:

(1) name;
(2) address;
(3) date of birth;
(4) occupation;
(5) rate of pay; and
(6) compensation earned each week.

STATEMENT OF THE CASE

Between 1982 and 1985, Firestone shuttered 25 of its 49 passenger retread tire plants due to a significant decline in demand. The closures decreased the number of production employees from 533 to just 230. The retread division posted losses of $1,934,601 in fiscal year 1983, and $1,558,450 in 1984.[1]

The substantial decreases in the number of operating plants and hourly production workers, not surprisingly, forced the Company to re-examine its Akron, Ohio salaried workforce, the division having become top-heavy. Gary Adams was the salaried manager for retread equipment, and his responsibilities focused largely on coordination and transfer of equipment between retread plants. Firestone determined that his position could be eliminated entirely, with the least detrimental effect on continued operations, since the substantial decline in the number of retread plants significantly diminished the need for new or replacement equipment. John Wiggins held the position of salaried coordinator and product planning, which involved sales promotions, planning and forecasting in addition to negotiating sales contracts for tread rubber, repair materials and retread. Again, the continued need for these responsibilities correlated directly to the number of operating units. Upon

[1] A part of Petitioners asserted age pretext evidence consisted of an allegation that the retread division experienced a profit in June, 1986—eleven months after they were released (Pet. at 10). Certainly this after-the-fact evidence, whether accurate or not, fails to raise a genuine issue of material fact as to reduction in forces occurring over those periods of time when the division was patently unprofitable. It was only by cutting back and eliminating unnecessary positions of employment that the losses could be turned into a gain, and ultimately, the entire division sold. The fact Firestone achieved its goal of making the division profitable is perhaps the best evidence that its decisions were the correct ones and sound.

elimination of these positions, no one was ever transferred in or hired to fill them, and whatever responsibilities remained of once full-time positions were parceled out to the remaining salaried employees who were performing different duties. The decisions to eliminate these salaried positions were made by two executives, John E. Fry, Jr., age 46, and J. R. Thomas, age 57. The reductions occurred the week of August 22, 1985.

Nearly two years later, on August 21, 1987, Wiggins and Adams commenced an action against Firestone in the Court of Common Pleas of Summit County, Ohio alleging, *inter alia*, that they were released in violation of the ADEA; in violation of Ohio's age discrimination statute, Ohio Rev. Code §4101.17; and in breach of an implied or expressed contract for continued employment. Firestone timely removed the causes to the United States District Court for the Northern District of Ohio, Eastern Division, on the basis of federal question jurisdiction, pursuant to 28 U.S.C. §1441. Following completion of discovery, Firestone moved for summary judgment, arguing that neither plaintiff could establish a *prima facie* case of unlawful age discrimination and, in the alternative, that neither could establish that the elimination of their salaried positions of employment was pretextual. On March 22, 1988, the district court granted Firestone's motion on the ADEA claim, remanding the pendent claims for disposition by the state court. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614 (1988). Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's decision on June 7, 1959. A petition for rehearing and rehearing *en banc* was timely filed and denied by the court on July 26, 1989.

REASONS FOR DENYING DISCRETIONARY REVIEW

I. THE DECISION BY THE SIXTH CIRCUIT DOES NOT PRESENT A CONFLICT WITH THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS OR OF THIS COURT, AND DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW NOT ALREADY SETTLED BY THIS COURT.

A. The Sixth Circuit's Decision That Purported ADEA Discriminatees Produce Direct, Circumstantial Or Statistical Evidence To Establish A *Prima Facie* Case Of Unlawful Discrimination, Where Positions Of Employment Are Entirely Eliminated During a Departmental Reorganization, Is Not At Odds With Any Other Circuit.

To bolster their Petition before this Court, Petitioners have manipulated, twisted and misstated the unpublished, *per curiam* opinion drafted by the court of appeals, all in an effort to artificially create circuit conflict. If successful, and the Petition is granted, it would serve to transform *certiorari* from discretionary to obligatory review through simple mischaracterization. Acceptance of this Petition would represent the ultimate advisory opinion since the court below never held what Petitioners now claim it did.

Although Petitioners have certainly expressed *their* belief that the Sixth Circuit requires, "... in order to establish a *prima facie* case, [that they] show that a younger person directly replaced [them] in [their]

'eliminated' job" within this Court's *McDonnell Douglas* analysis (Pet. at i),[2] the Court's written opinion in this and other cases tells a different tale:

> The district court determined that Wiggins and Adams failed to prove that Firestone used the RIF *as a pretext to discriminate against them on the basis of their age.*
>
> * * *
>
> Although this Court has relied on the criteria established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether plaintiffs have shown a *prima facie* case of discrimination, this Court has "refused to follow blindly the four-part McDonnell Douglas formula in ADEA cases" and has instead "adopted a case-by-case approach, one that would allow us to remain attentive to the realities of the business world." *Simpson v. Midland Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987). Thus, the Court has stated that to establish a *prima facie* case of discrimination *in non-RIF situations*, plaintiffs must show that they were members of a protected class, that they were subject to an adverse employment action, that they were qualified for their positions, and that they were replaced by younger persons. In reorganization cases, this court has required plaintiffs to "come forward with additional direct, circumstantial, or statistical evidence that age was a factor in [their] termination." *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984).

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[2] In the trial court, Petitioners sought to establish their ADEA claims under the indirect method of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The propriety of using this Title VII analysis in ADEA claims is not in dispute. "[T]he substantive provisions of the ADEA 'were derived *in haec verba* from Title VII' 'and apply with equal force.' " *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

> Turning to the instant action, although Wiggins and Adams have satisfied the first three parts of the *McDonnell Douglas* test, the record does not indicate that they were not replaced by younger workers but, rather, that their work was merely distributed to existing workers. *Assuming, arguendo, that they satisfied the McDonnell Douglas test for a non-RIF setting, the additional evidence which they presented fails to prove that age was a factor in their termination* (emphasis added).

The court did not, as represented in the petition, mandate Petitioners to point to a "replacement"—direct or indirect—in order to evidence a *prima facie* inference of age discrimination within the backdrop of corporate reorganizations, only that, in lieu thereof, they come forward with "something else" before the defendant-employer will be called upon to meet its burden of production. The Sixth Circuit made this position clear in published opinions both before and after its decision here. *See Tye v. Bd. of Edc., Polaris Jt. School Dist.*, 811 F.2d 315, n.1 (6th Cir. 1987) ("Appellees' argue that because Ms. Tye was terminated as part of a reduction in force, this circuit's decision in *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984), requires her to present additional evidence in her *prima facie* case. *LaGrant* holds that an ADEA plaintiff who cannot prove that he was replaced by a younger person in a reorganization or reduction in force, must present in his *prima facie* case some direct, circumstantial, or statistical evidence that age was a factor in his termination"); *McMahon v. L-O-F Co.*, 870 F.2d 1073, 1077 (6th Cir. 1989) ("However, LOF contends that plaintiffs failed to establish a *prima facie* case of age discrimination [because of lack of replacements] as set forth in *LaGrant v. Gulf. & Western Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984). In *LaGrant* we only held that when

there is a corporate reorganization or reduction in forces, the 'mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case of age discrimination'. *LaGrant*, 748 F.2d at 1090. All *LaGrant* required was that the plaintiff come forward with additional direct, circumstantial or statistical evidence that age was a factor in his termination").

The Sixth Circuit's holding not only makes common sense,[3] it is aligned with the opinions of its sister circuits. *See Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989) (It is not discriminatory to discharge a worker and re-assign his job duties pursuant to a reduction in force); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) ("In reduction-in-force cases, plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee. Consequently, courts have modified the fourth *prima facie* element by requiring the plaintiff to 'produce evidence, circumstantial or direct, from which a fact

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[3] Petitioners suggest that whenever an age 40 + employee is displaced in an employer's reorganization, and younger employees retained in any other, albeit different positions, their claim of discrimination ought to find its way to a jury:

> In sum, even without a direct RIF replacement or direct evidence of discriminatory intent, the former employees' disparate treatment case based upon retention of younger employees and/or more favorable treatment of them should go to a jury.

(Pet. at 13). This position would seem to urge a restructuring of the *McDonnell Douglas* burdens of proof, something this Court rejected just last term. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. _____, _____, 108 S. Ct. 2777, 2784 (1988); *Wards Cove Packing Co. v. Antonio*, 490 U.S. _____, _____, 109 S. Ct. 2115, 2126 (1989). A second problem with this argument is that the Sixth Circuit did not state or hold that it mandated "a direct RIF replacement" or "direct evidence of discriminatory intent".

finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue' "); *Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988) (substituting replacement criteria with showing ". . . that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff"); *Montana v. First Federal S & L of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989) ("As alternatives, the plaintiff was permitted to show direct evidence, statistical evidence, or circumstantial evidence supporting an inference of age discrimination").

The opinion hardly conflicts with this Court's teachings. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (the *McDonnell Douglas* test "was never intended to be rigid, mechanized or ritualistic"). *Accord Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, n.6 (1981); *McDonnell Douglas Corp.*, 411 U.S. at 802.

II. THE DECISION BY THE SIXTH CIRCUIT MUST BE AFFIRMED DUE TO AN ABSENCE OF PRETEXT EVIDENCE.

A. The Sixth Circuit Correctly Held That Petitioners Failed To Unearth Any Evidence That Respondent's Reduction-in-Force Was But A Pretext To Discriminate Against Them On The Basis Of Their Ages.

Conveniently ignored in the petition is the finding by the Sixth Circuit that Petitioners had failed to meet their ultimate burden of creating genuine issues of material fact that Respondent reduced its forces and eliminated salaried positions all in an effort to mask its discriminatory objective. Where Petitioners miss the boat is that even if the Sixth Circuit erred by requiring them to come forward with "direct, circumstantial or statistical" evidence at the *prima facie* stage, that same evidence in one form or another is nonetheless indispensible at the pretext level of *McDonnell Douglas*:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.*

Burdine, 450 U.S. at 256 (emphasis added).

The pretext evidence offered by Petitioners was neither genuine nor material, and included: (1) the contention that Petitioners were not permitted to bump or transfer into other Firestone positions pursuant to a "self-imposed contractual duty to allow transfers" (Pet.

at iii),[4] all the while ignoring that the written Firestone policy only permitted transfers where the employee formerly supervised or at one time held remaining employment positions, and that neither Petitioner met this criteria; (2) the allegation that "[f]rom at least as early as 1982 . . . the employer . . . maintained, generated and disseminated in Akron a plethora of facially discriminatory computerized personnel forms and reports, rife with birthdates" (Pet. at 8), while failing to mention that retention of this information is compelled under current federal regulations, 29 C.F.R. §1627.3, and moreover, without mentioning that there was an absence of proof the information was ever utilized or even available for purposes of personnel decisions; and (3) the suggestion that ". . . the average age in the department thereby decreased from 45.3 to 43.9 years and had decreased from 50 years in 1981" (*Id.*), while ignoring the critical flaw of establishing under what circumstances—voluntary or involuntary—the employee departures occurred.

It is not shocking to find that every one of the ten circuit decisions cited by Petitioners as "conflict" established this indispensible pretext evidence. *See Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir. 1983); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 860 (11th Cir. 1988) (showing not only a younger replacement, but probative statistical

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[4] A further mischaracterization contained in the petition is the suggestion that Respondent's employee handbook "has been held to have created a unilateral contract and part of its salaried employees' package" as allegedly affirmed in relevant part by this Court in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), _____ U.S. _____, 109 S. Ct. 948 (1989). This Court is most assuredly aware of the opinions it authors and no unstrained reading of *Bruch* could even suggest the Court had addressed this issue of state law.

evidence as well); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1334 (1st Cir. 1988); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir. 1989); *Oxman v. WLS-TV*, 846 F.2d 448, 456 (7th Cir. 1988); *Herold v. Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir. 1988); *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 60 (3d Cir. 1989); *Montana v. First Federal S. & L. of Rochester*, 869 F.2d 100, 105 (2d Cir. 1989).

Petitioners further contend "[t]he District Court and Court of Appeals ignored the 'existence' of the Age Data Forms, apparently *sub silentio* finding them permissible . . . ." (Pet. 15). There was nothing *sub silentio* about the Circuit's holding, and it most assuredly did not ignore this "evidence" (*See* Pet. App. p. A5). Not only did Plaintiff's counsel concede at oral argument before the Court of Appeals that Firestone was required to keep this information as part of its federal record-keeping obligations, but the Court went on to observe there was no disputed evidence offered by Petitioners that the forms were used to make employment decisions, let alone these particular employment decisions (*Id.*). At best, granting the petition in this case would place this Court in the position of merely re-examining record evidence that has already been thoroughly reviewed and discounted by the two lower federal courts.

CONCLUSION

The decision by the Sixth Circuit is not at odds with another circuit that has ruled on the precise issue sought to be reviewed. However, even if the Sixth Circuit's *prima facie,* substitution criteria of "direct, circumstantial, or statistical evidence" were struck down, the opinions and ultimate conclusions regarding age discrimination that were reached below must nevertheless be affirmed at the pretext level of the *McDonnell Douglas* analysis. Thus the petition for writ of *certiorari* must be denied.

Respectfully submitted,

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